LEGAL CAUSE IN ACTIONS OF TORT.

[*Continued.*]

WE now proceed to consider the intrinsic correctness of the alleged rule of non-liability for improbable consequences. The alleged rule, stated in a negative form, is: that a wrongdoer is not liable for improbable consequences. Or, stated in an affirmative form, it is: that a wrongdoer is liable for probable consequences only; for the reason that only such consequences can be deemed to have been "caused," in the legal sense, by his tort.

The alleged rule, in effect, states two requisites, both of which must be made out in order to establish in law a causal relation between defendant's tort and plaintiff's damage; namely:

A (1). The damage to plaintiff must be an actual consequence of defendant's tortious act.

A (2). This consequence (the happening of the damage) must have been reasonably foreseeable at the time of committing the tort (at the time of doing the tortious act).[1]

Or, to express the requisites in other words,

B (1). Defendant's tortious conduct must have been in fact a cause of plaintiff's damage.

B (2). That the tort would be likely to cause the result must have been reasonably foreseeable at the time of commission.[2]

What interpretation is to be put upon the words "an actual consequence" in A (1); or upon the words "in fact a cause" in B (1)?

Either, the meaning is — What would have been regarded as the "actual consequence or cause" in the eye of the law, and for

[1] See Terry, Leading Principles of Anglo-American Law, §§ 551, 110.

[2] This view, whether intrinsically correct or not, is very distinctly brought out by Mr. Bower: "To prove that the damage resulted from the slander in fact . . . is to prove nothing. The causal connection must be established in the first place, but it must also be shown that the cause is a '*vera causa*' in the philosophical sense, that is, something which, in the ordinary course of events, would be expected to produce a result of the kind proved. . . . The following are cases where the damage, though resulting in fact from the slander, was held not to be the natural or probable consequence thereof, so as to constitute a cause of action; . . ." Bower, Code of the Law of Actionable Defamation, 34, note *r*.

which a defendant would have been held liable, if it were not for the additional legal requirement that a consequence must have been legally foreseeable.

Or, the meaning is — What would have been deemed the "actual consequence or cause" by a reasonable man, deciding the question as purely a question of fact, and using those terms in their ordinary signification without regard to legal definitions or requirements.

(These phrases are often used in the latter sense in this discussion.)

Under either of the above interpretations of the alleged rule, a defendant will escape liability for an actual consequence of his tort (for a result of which his tort was in fact the cause) unless such result was reasonably foreseeable (probable). It is not enough that the damage was an actual consequence. It must also have been a probable consequence. Otherwise it is not regarded as having been "caused" by the tort.[3]

So far as to the interpretation of the alleged rule.

Now, as to its application. For what purposes, or with what effect, is it to be applied?

Either (1), the alleged rule is to be applied as an arbitrary rule; exempting tortfeasors from liability, upon the ground of expediency, in cases where defendant's tort was in fact the actual cause of the damage;

---

[3] But it may be asked — Is it not begging the question to assume that an improbable consequence can ever be an actual consequence, or that a tort can ever be in fact the cause of a consequence which was not probable? How can you so assume until you have first definitely settled what constitutes the legal test of the existence of causal relation; the very point in issue in the present discussion?

An obvious and sufficient answer is that the alleged rule itself so assumes. Else the word "improbable," instead of being prefixed to "consequence," should be rejected as surplusage.

Moreover, there are additional considerations bearing upon the above inquiry. We have already stated several other rules; each of which purports to furnish the exclusive legal test of the existence of causal relation; and each of which has some support from authority. These rules may be said to be in competition with the alleged rule of non-recovery for improbable consequences. Now, under the application of any one of these rival rules, it would not unfrequently be decided that a consequence which was not reasonably foreseeable was nevertheless an actual consequence, and that defendant's tort was in fact the cause of the improbable result.

Again: Suppose that we discard all legal tests, and deem the question of causative relation to be purely one of fact; an issue to be decided by the triers of fact unhampered by artificial rules or arbitrary legal definitions. Under such circumstances it would repeatedly be found that an improbable consequence was an actual consequence; that a tortious act was in fact the cause of a result which was not probable.

Or (2), its sole office is to furnish an exclusive and professedly infallible legal test whereby to solve the question of fact what is the actual consequence, what is in reality the cause.

As to the first application, there is certainly no *a priori* presumption in favor of the justice of such a rule. *Primâ facie*, it would seem that, in the case of unlawful acts, "he who wilfully, negligently, or otherwise, breaks the law . . . should be responsible for all damage which he actually causes thereby to other persons."[4] On the primary question whether a defendant's conduct should be deemed wrongful (in a certain sense "unlawful"), it is often reasonable "that his conduct should be judged of by the probability of its causing injury to others."

"But when he stands as a proved wrongdoer and it is sought to make him responsible for the consequences to others of his wrong, what principle of justice or reason requires us to ask whether he foresaw or could have foreseen those precise consequences or not?"[5]

On the question of expediency we take issue with the supporters of the rule. We believe that more injustice than justice would result from such an application. The arguments *pro* and *con* will be more fully considered later in connection with the subject of causation in cases of negligent torts, where the subject has been more discussed than in any other connection, and where it has been claimed that there are special reasons for establishing a rule favorable to defendants.

As to the second application: Viewed superficially, it may seem widely different from the first application. It does not profess to be a limitation, on the grounds of expediency, of a wrongdoer's liability for damages which were actually caused by his tort. It professes to be simply a legal test to determine whether the damages were in fact caused by defendant's tort; whether a causal relation between defendant's tort and plaintiff's damage actually existed. But in reality the second application is an attempt, by an indirect method and with the aid of legal fiction, to bring about the same result that would follow directly from the first application. What difference does it make to the plaintiff whether his claim is disallowed

[4] Mr. Salmond's conclusion, that the law "is not so," would appear to be adopted in deference to the supposed weight of authority and not upon principle. See Salmond, Torts, 2 ed., 105; Salmond, Jurisprudence, ed. 1902, 477–479.

[5] See Terry, Leading Principles of Anglo-American Law, § 551.

upon the ground that it is inexpedient to allow recovery for an actual consequence if the happening of that consequence were improbable, or whether it is disallowed upon the ground that the law conclusively presumes that an improbable consequence was not an actual consequence of defendant's tort?

If it is asserted that the law invariably presumes (1) that an improbable result is not an actual result, or (2) that an improbable result is not caused by defendant's tort, or (3) that "actual result" and "probable result" are always equivalent terms; the answer is that the law would thus presume what frequently is not true in fact. The arbitrary test here proposed does not furnish a rational method of solving the issue of fact.

The probability that some harm will ensue may sometimes be a legal test of the tortiousness of defendant's conduct. But if it be once established that his conduct was tortious, and throughout this discussion we are proceeding upon the supposition that this has been established, then we submit that the probability or improbability of a result does not furnish a *legal* test of the existence of causative relation between defendant's tort and plaintiff's damage. Upon the question of fact whether the alleged damage actually occurred, or upon the question of fact whether defendant's tort actually caused such damage, probability may be a circumstance to be weighed by the jury in passing upon these questions of fact, a consideration to which they may give such probative weight as they think proper. But such probability does not constitute a legal test entitled to conclusive effect. (This subject and the confusion due to different meanings of the word "probability" will hereafter be considered more in detail.)

In brief, the question is whether defendant's act caused a particular result. That question is not to be conclusively decided by applying the test whether the effect which actually resulted was probable. The causative effect of defendant's tortious conduct is not increased by the fact that a particular result was foreseeable.[6] The question as to the causative effect of a particular act is entirely distinct from the question as to the tortious nature of the same act.

[6] "Probability is not an attribute of events in themselves but of our expectations of them. It is subjective, not objective. It is a name for somebody's guess whether they will happen." See Terry, Leading Principles of Anglo-American Law, § 547.

To avoid the possibility of misunderstanding, let us restate our general assumption, and the specific questions which are to be considered:

Assume that the defendant has committed a tort as against the plaintiff.

Assume also that the plaintiff has suffered damage of a kind which the law will notice and will afford redress for.

Then the problem is, whether the courts will treat the defendant's wrongful act as the cause, in the legal sense, of the damage to the plaintiff, and will hold the defendant liable for such damage.

This general problem raises two questions.

(1) Is defendant's tort in fact the cause of plaintiff's damage?

(2) If so, should the court establish an arbitrary rule of law, absolving (exonerating, exempting) defendant from liability for all, or any part of, the damage of which his tortious act is in fact the cause?

The first question is one of fact. If it is answered in the negative, there is an end of the case.

The second question is one of public policy or expediency.

It is assumed for the present that, as to the decision of the first question, the tribunal passing upon the matter of fact should not be hampered or influenced by any so-called rules of law, either *primâ facie* or rigid; or by any considerations of public policy. The first question, whether the damage was in reality caused by the defendant's tort, should be decided without reference to the second question, when, if at all, shall the law deem it expedient to exonerate a tortfeasor from liability for effects which were in reality caused by his tort.

In order to test the practical working of the alleged rule of non-liability for improbable consequences, and in order to consider what, if any, exceptions must be admitted if the general doctrine of the rule is to be adopted, it is desirable to consider separately its application to various distinct situations.

To begin: we adopt the view of Judge Townes, that the consequences of conduct should be divided into two classes — "those intended to be produced by the person whose conduct is under investigation, and those not intended by him."[7]

[7] Townes, Torts, 150.

First. As to intended consequences; using "intended" in the sense of "desired"; but not in the sense of "foreseen" or "expected."[8]

A defendant does a tortious act, desiring that it may result in causing certain specific damage to plaintiff; but the defendant believes that there is only a very slight possibility of such a result; and such would be the belief of an average man in defendant's situation. The desired but improbable result actually happens. The defendant claims that the rule of non-liability for improbable consequences covers the case; and that under this rule he is absolved from liability.[9]

To put a concrete illustration: Defendant, desiring to shoot plaintiff, aims a gun at plaintiff and fires. The chances are ninety-nine out of a hundred that the gun will not carry far enough to reach plaintiff, and defendant so understands. The gun, however, for a wonder, does on this occasion carry far enough, and the plaintiff is wounded. Can defendant escape on the plea that the hitting of the plaintiff was a consequence not to have been reasonably anticipated; a result which he himself and all sensible bystanders deemed highly improbable?

No court would exonerate him. All legal writers who have considered the question would hold him liable.

"Every man is responsible for damage which he intended to result and which did result from his wrongful act, however improbable it may have been." [10]

---

[8] See 20 HARV. L. REV. 256, note 4.

[9] A distinction must be drawn between consequences which are actually foreseen by the defendant as probable, and consequences which are desired by the defendant but which neither the defendant nor anybody else regards as probable. Although an average man might not foresee that certain specific damage was likely to result from defendant's tortious conduct, yet if the defendant himself believed that such a result was likely to follow, then, if it does follow, he cannot escape under the rule of non-liability for improbable consequences. "That which a man actually foresees is to him, at all events, natural and probable." Pollock, Torts, 8 ed., 32. And see Watson, Damages for Personal Injuries, § 143.

But this differs from the case stated in the text above. There, although the result is desired by the defendant, yet it is not foreseen by the defendant or by anyone else, as likely to follow.

[10] Salmond, Torts, 106. And see 1 Jaggard, Torts, 75; Bower, Code of the Law of Actionable Defamation, 34.

"If a result is intended, the doer will answer for it however remote it is, and however little natural or probable."[11]

"But even where the damage is such as a person possessed of all the defendant's knowledge of the surrounding circumstances could not have reasonably anticipated as likely to flow from the wrongful act, the defendant will nevertheless be liable if he intended the result which in fact happened."[12]

"It does not lie in a man's mouth to say that the consequence which he deliberately planned and procured is too remote for the law to treat as a consequence."[13]

This doctrine, about which there is no doubt, is entirely inconsistent with the alleged sweeping rule of non-liability for improbable consequences. That rule could, of course, be amended in such a way that it would not cover this case of an improbable but desired consequence. As the rule is usually stated, however, liability for such a consequence constitutes an exception to the rule.

Unsuccessful attempts have been made to reconcile these two incongruous doctrines. In Clerk & Lindsell on Torts[14] it is said: "Intention will supply the necessary link to make that consequence proximate which was *primâ facie* remote." Mr. Street, who by the way does not endorse the alleged rule of non-liability for improbable consequences, says:

". . . the mental attitude of the wrongdoer is of capital importance in determining whether a given element of damage is proximate or remote. . . . The factor of malice (in the sense of intending particular harm) is thus often important in determining whether damage can be treated as a proximate result of a given wrongful act."[15]

And it has been said that "in cases of wilful or malicious wrong the rule of remoteness is 'relaxed.'"

But this reasoning is unsatisfactory. The defendant's specific intent or desire does not add anything to the causative effect of the defendant's conduct. The effect of defendant's tortious con-

[11] Salmond, Jurisprudence, ed. 1902, 479.

[12] Clerk & Lindsell, Torts, 5 ed., 147.

[13] Pollock, Torts, 8 ed., 331.

[14] 5 ed., 147.

[15] 1 Street, Foundations of Legal Liability, 489. In the omitted portion, the learned author seems to have in mind the case of one who actually foresees particular damage as an ultimate result; and he may have intended the above-quoted passage to refer to such an actor.

duct is not thereby made more appreciably continuous down to the time of damage. Defendant's conduct is not thereby made a more substantial factor in subjecting plaintiff to damage; nor is it thereby made any more potentially operative for harm at the time when the damage itself was inflicted. "The character of the wrong or condition of mind of the defendant" may sometimes furnish ground for allowing exemplary damages, but do not bear upon the wrongdoer's responsibility for actual consequences of his proved or admitted tort. They do not create a liability for actual damage if that liability would not otherwise have existed.[16]

Now as to the unintended consequences.

The question as to liability for such consequences may arise:

1. In torts other than negligent torts.

2. In negligent torts.

Consider first, as to unintended consequences in torts other than negligent torts.

What we now desire to call particular attention to is the fact that, in many jurisdictions, the alleged rule, when sought to be applied to cases falling under this special division, would be held to be subject to important exceptions; and that the allowance of some of these exceptions seems inconsistent with the view that the alleged rule itself is intrinsically correct.

What are these "exceptions"? In what classes of cases falling under this particular head do courts fail to apply the alleged rule of non-liability for improbable consequences?

We begin by calling attention to two important sets of cases, sometimes put under one general head; but perhaps better stated as separate classes.

Class 1. Courts frequently hold a wrongdoer liable for an improbable consequence in cases where defendant's conduct was not only tortious but criminal, where defendant's conduct was "illegal" in the sense of being criminal, especially if the crime were of some

[16] See A. G. Sedgwick, Elements of the Law of Damages, 2 ed., 56; Elliott, C. J., in Indianapolis, etc. R. Co. *v.* Pitzer, 109 Ind. 179, 189, 6 N. E. 310, 315, 10 N. E. 70 (1886).

magnitude.[17] This doctrine is sometimes stated as if confined to crimes which are *mala in se*, but we do not think that it is so limited.

A good illustration of this judicial tendency, which prevails in criminal cases as well as civil, is furnished by the case of Queen *v.* Saunders,[18] where Saunders was held liable for an improbable result, and one which he did not desire. The case is thus summarized by Mr. Bishop[19]: If one "gives poison to a person whom he means to kill, but who innocently passes it to another not meant, yet who takes it and dies": — the party originally giving the poison and unintentionally causing the death, "is guilty, the same as if he had meant it, of the felonious homicide."[20] A similar result would be reached to-day in a civil action under a death statute founded on the same state of facts; *i. e.* action under statute giving civil remedy to administrator or relatives of a deceased person for death caused by the tort of the defendant.

Some of the reasons given for this class of decisions are erroneous. It has been said that defendant is liable because "the law conclusively presumes that all the consequences were foreseen and intended."[21] So there is occasional talk about "constructive intent"; or about transposing or transferring the intent to the unintended result. These fictions should be discarded. They serve only to conceal the fact that courts refuse in such cases to apply the alleged rule of non-liability for improbable consequences.

Class 2. Courts frequently hold a wrongdoer liable for improbable consequences in cases where his act was intentional and was consciously wrong; even though the act was not criminal, and though the specific result which followed was not intended.[22]

---

[17] See Sedgwick, Damages, 6 ed., 89, 99, 129; Terry, Leading Principles of Anglo-American Law, §§ 537, 551. *Cf.* 1 Bishop, New Criminal Law, §§ 226, 760, 762, paragraph 4.

[18] 2 Plowd. 473 (1574).

[19] 1 Bishop, New Criminal Law, § 328.

[20] The court did not base their decision upon the failure of Saunders to take the poisoned apple away from his daughter, but upon his giving it to his wife with intent to poison the wife.

[21] See 16 Am. & Eng. Encyc., 1 ed., 434.

[22] It is sometimes said that the wrongdoer is held liable when his conduct is "wilful and malicious," but we prefer the phraseology used in the text.

Here we have another "exception" to the alleged general rule that a tortfeasor is not liable for improbable consequences. Wyant *v.* Crouse[23] is an example of this class of cases. This was an action on the case for the destruction of plaintiff's blacksmith shop by fire. Defendant wrongfully broke into the shop and started a fire in the forge. He was not negligent in managing the fire, nor in looking after it and in using proper precautions to prevent it from doing damage. After he left the shop, a result occurred which was not to have been anticipated as likely to happen. The building in some unexplained way became ignited from the fire in the forge and was consumed. The court said: ". . . the defendant intended no such injury nor did he any act which can be said to have given reason for expecting the consequences. It was a fortuitous consequence of his act, entirely unforeseen." Nevertheless he was held liable for the burning of the shop. The court said: "He was engaged in an unlawful act, and therefore was liable for all the consequences, indirect and consequential as well as direct, . . ."

No one can fail to see that the results frequently reached in the two sets of cases just stated under Class 1 and Class 2[24] are entirely inconsistent with the existence of a general rule of non-liability for improbable consequences. Mr. Street combines the results in both classes under the following statement:

". . . we find this to be true, that as the wrongful act which is alleged to have caused the damage increases in moral obliquity or in

[23] 127 Mich. 158, 86 N. W. 527 (1901).

[24] As to (1) and (2) we have said that courts "frequently hold." They do not always so hold, nor are jurists unanimously agreed as to whether they should so hold. But the tendency seems in favor of such holding.

Lord Bacon, in his comments upon the maxim generally cited under his name, says: "This rule faileth in covinous acts, which, though they be conveyed through many degrees and reaches, yet the law taketh heed to the corrupt beginning, and counteth all as one entire act. . . ."

". . . In like manner this rule holdeth not in criminal acts, except they have a full interruption; because when the intention is matter of substance and that which the law doth principally behold, there the first motive will be principally regarded, and not the last impulsion." Bacon's Works, Eng. ed. 1879, Vol. 7, 328, 329.

For authorities and various expressions of opinion, *cf.* 1 Jaggard, Torts, 372, 382; 1 Sedgwick, Damages, 6 ed., 89, 99, 129; 1 Sutherland, Damages, 3 ed., §§ 43, 44; Pollock, Torts, 8 ed., 49–51; 36 Am. St. Rep., note 819, 820; Terry, Leading Principles of Anglo-American Law, §§ 547, 557.

illegality, the legal eye reaches further and will declare damage to be proximate which in other connections would be considered to be remote." Or in other words "legal causation reaches further" in some kinds of torts than in other kinds.[25]

If the alleged rule of non-liability for improbable consequences is intrinsically correct, why allow the inconsistent and exceptional doctrines which frequently prevail in Class 1 and Class 2? Is the causative effect of defendant's conduct increased by its criminality, or by its enormity, or by its objectionable moral quality? To these latter questions there can be but one answer. The defendant's conduct in such cases is no more a cause, either in logic or in fact, of plaintiff's damage than his conduct is a cause in the case of an ordinary tort not involving these specially objectionable features.

Is not the following explanation correct?

The so-called exceptional doctrines in Class 1 and Class 2 are recognized by the courts, not because there are special reasons why the alleged general rule is inapplicable to these cases, but because the alleged general rule itself is intrinsically unjust, and its injustice is more readily apparent in these cases than in ordinary instances.

We find no fault with the doctrine often prevailing in Class 1 and Class 2. What we do complain of is, that this doctrine should be stated as an exception to an alleged general rule of non-liability for improbable consequences; instead of being regarded as a logical application of a general rule of causation which does not profess to exclude liability for improbable consequences. If the doctrine frequently prevailing in Class 1 and Class 2 is correct, does it not follow that the alleged general rule is wrong? And, on the other hand, if the alleged general rule is correct, what logical ground exists for the qualification, or denial, of it which obtains in Class 1 and Class 2?

If all these incongruous and inconsistent doctrines are to be upheld, the result would seem to justify Mr. Street's position — that "the line of demarcation between proximate and remote damage . . . is really a flexible line."[26]

[25] 1 Street, Foundations of Legal Liability, 111.

[26] 1 Street, Foundations of Legal Liability, 111.

Besides Classes 1 and 2, just discussed, there are additional instances falling under the same general head of "torts other than negligent torts," where courts allow recovery for unintended and improbable consequences. As the "tort" in these instances is either based on an exceptional common-law doctrine, or upon a liability or duty created by statute, we do not lay so much stress upon them as upon Classes 1 and 2; but Class 3 and Class 4 deserve some consideration in this connection.

Class 3. Cases where the common law imposes upon a man absolute liability, irrespective of any actual fault on his part; cases of so-called "extra-hazardous user of property," or "acting at peril"; where an actor is practically made an insurer.

In some cases of this class, probability of the damaging result is not a requisite test of causal relation. Recovery is allowed for improbable consequences.[27] Take, for instance, the case of the keeper of an animal which the law considers dangerous to mankind, and hence kept at peril. In Filburn *v.* People's Palace and Aquarium Co.[28] the jury found specifically that the particular elephant in question was not an animal dangerous to man. This certainly seems to involve the finding that there was no reasonable cause to anticipate that the elephant would harm the plaintiff. Yet the keeper of the elephant was held liable, notwithstanding the improbability of the result which actually occurred.[29]

---

[27] But see Salmond, Torts, 2 ed., 105, 107.

[28] 25 Q. B. D. 257 (1890).

[29] See Terry, Leading Principles of Anglo-American Law, §§ 547, 557.

There is another large class of cases where, in common-law actions, defendants are held liable for improbable consequences. But the result in many of these cases is reached upon a peculiar theory as to the defendant's position, and the cases are not discussed by the courts as if they specially concerned a question of causation. Hence it may be doubted whether they ought to be regarded as furnishing a distinct exception to the alleged rule of non-liability for improbable consequences.

The tort in these cases "consists in the unlawful assumption of dominion over another's property." See 36 Am. St. Rep. 821, note. Mr. Salmond says: "The rule as to remoteness of damage has no application to those cases in which a defendant has wrongfully taken possession of or otherwise dealt with property in such a manner that it is now at his risk. In such a case he is responsible for any resulting loss, destruction, or damage of that chattel, however remote that consequence may be." Salmond, Torts, 2 ed., 114. And see 1 Sedgwick, Damages, 9 ed., § 121 *a*.

In a very large proportion of these cases, the defendant's tort is what is technically called "conversion." While the plaintiff is nominally seeking to recover "damages" for the conversion, he is really compelling the defendant to purchase the chattel, pay-

Class 4. (a) Some cases where an action is expressly given, or a liability expressly imposed, by statute for conduct which, though involving fault on the part of the defendant, was not actionable at common law. Also (b) some cases where, though the statute does not in express terms give an action, yet the courts hold that breach of the statutory duty affords basis for an action of tort.[30]

Of course the precise question in these cases is one of legislative intention; not what is the general common-law rule of legal cause; but what rule did the legislature intend should be applied to determine the question of the existence of causal relation under the particular statute.[31] But the legislature, where there is nothing in the words or the subject-matter of the statute to indicate the contrary, is supposed to use legal terms in their common-law signification. Here we have statutes which, in expressly imposing liability for damage, use such terms as "caused by," "occasioned by," "arising from," "by means of," "happening by reason of," "in consequence of," and the like. And we find that under some of these statutes the courts allow recovery for consequences which were improbable. Such decisions would indicate judicial doubts, to say the least, as to the intrinsic correctness of the alleged common-law rule of non-liability for improbable consequences, or in other words the supposed common-law doctrine that probability is essential to the existence of causal relation. Indeed, it might seem that judges construe the term "caused," or its equivalent, when used in a statute, without feeling hampered by previous judicial definitions or *dicta* in common-law actions; and that they feel at liberty here to take a common-sense view, which their predecessors might well have adopted when the question first arose in common-law actions.

---

ing a price equal to its value at the date of conversion. See Salmond, Torts, 2 ed., 339. He has a right to elect to consider the chattel as the property of the defendant from the moment of the conversion; and hence at the risk of the defendant so far as concerns any harm happening to it, even though such harm was not probable.

[30] As illustrations of (a), see Davis *v.* Standish, 26 Hun (N. Y.) 608 (1882); Eten *v.* Luyster, 60 N. Y. 252 (1875); Barker *v.* Western Union Tel. Co., 134 Wis. 147, 114 N. W. 439 (1908).

[31] It is assumed to be competent for the legislature to enact that some rule of causation other than the common-law rule shall apply in actions under such statutes. See 1 Sutherland, Damages, 3 ed., § 16, p. 44; 1 Sedgwick, Damages, 9 ed., § 120 *b*.

There are also statutes which impose liability upon innocent persons, who are not wrongdoers even in theory or in legal fiction. Decisions under such statutes might seem irrelevant upon the question of the tests of causal relation in an action of tort. But these decisions, when analyzed, have some tendency to impair, if not to refute, an argument sometimes urged in favor of the alleged rule of non-liability for improbable consequences.

The British Workmen's Compensation Act of 1897[32] imposes liability upon an employer to his workman, entirely irrespective of any fault on the part of the employer or of anybody else. He is made liable to compensate his workmen for "personal injury by accident arising out of and in the course of the employment." This statute "is a law of compulsory insurance and quite beyond the region of actionable wrongs."[33] It provides *inter alia* for compensation "when death results from the injury." The English and Scotch courts both hold that the term "results" includes improbable consequences.[34]

In Dunham *v.* Clare, Collins, M. R., said:[35]

". . . the only question is whether death in fact resulted from the injury. If death in fact resulted from the injury, it is not relevant to say that death was not the natural or probable consequence thereof. The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation."[36]

These decisions under the Workmen's Compensation Act tend to negative a view, which perhaps no judge has ever explicitly stated as his *ratio decidendi* but which has in fact sometimes influenced judicial opinions. Courts, when holding in common-law actions that a tortfeasor is liable "only for probable consequences," have sometimes been influenced by the belief that there is no other practicable, "workable" test of the existence of causal relation.

[32] 60 & 61 Vict. c. 37.

[33] Pollock, Torts, 6 ed., 105.

[34] Dunham *v.* Clare, [1902] 2 K. B. 292; Malone *v.* Cayzer, Irvine & Co., Scotch Sess. Cas. (1908), 479; Ystradowen Colliery Co. *v.* Griffiths, [1909] 2 K. B. 533.

[35] At p. 296.

[36] It should be added that the learned judge intimated, in what we regard as a *dictum*, that the law would be otherwise in the case of a tortfeasor's liability at common law. In the latter case, he said that "the liability is measured by what are the reasonable and probable consequences of his breach of duty."

In their view, it is a case of "Hobson's choice"; the court must lay down this rule of causation, or have no test at all. Some decisions go far towards laying down a positive rule, that nothing can in law be deemed the result of an act, unless, at the time of doing the act, the happening of such a result could have been foreseen as a probable consequence. The judge, if pressed, might say that he means only that it is against public policy to hold a tortfeasor under such circumstances; not that the tortious act cannot be *in fact* the cause of the damage. But the latter idea, even though not formulated in words, lurks in some opinions. Now the above decisions under the British Workmen's Compensation Act are important as showing that it is possible for our modern tribunals to try the question of fact as to the existence of causal relation without applying the artificial test of whether the effect which actually resulted was probable.

We have just been considering the application of the alleged rule of non-liability for improbable consequences, in cases where the consequences were unintended and the alleged torts were other than negligent torts.

Now we have to consider the application of the alleged rule to unintended consequences of negligent torts. Assume that the consequences were unintended; and assume also that the alleged tort consisted in negligent conduct.[37]

Should the law absolve the defendant on the ground that the harmful consequence which actually followed was not reasonably

[37] In this connection two points should be carefully noted:

(1) Negligent conduct does not *per se* constitute an actionable tort. To make negligence actionable, actual damage to the plaintiff must have resulted from the defendant's negligence. There must not only be a legal duty of care owing from defendant to plaintiff and a breach of that duty; there must also be actual damage to the plaintiff, "caused," in the legal sense, by the defendant's breach of duty.

(2) Many of the cases where it is said that certain kinds of conduct are negligent *per se* "have in reality nothing to do with the doctrine of negligence at all. The duty is peremptory, and always was such. There never was any duty of choice, and negligence means simply non-performance. There is an entirely improper use of the word "negligence" to denote the simple failure to do an act that one is under a legal duty to do, . . . without regard to whether the omission is unreasonable or whether the duty is one of choice at all." Terry, Leading Principles of Anglo-American Law, § 200, pp. 185, 186.

foreseeable, *i. e.* was an improbable consequence, one which could not reasonably have been anticipated?

Right here the objection may be raised that the general question we are now proposing to discuss is a purely theoretical one, a question of no practical importance; inasmuch as no state of facts can be imagined which would present it for decision. We are assuming, it will be said, an impossibility; namely, that conduct may be tortiously negligent and yet be followed by unforeseeable consequences; whereas the essential requisite of negligence is that harmful consequences were foreseeable and ought to have been foreseen by the defendant. Else he was under no duty to use care. Unless there was foreseeable danger of harm, a defendant cannot be under any duty of taking care; and hence cannot be adjudged negligent. If, then, it is admitted that the specific harm which actually resulted in a given case was not foreseeable, how can the defendant be held negligent? And of course, if he were not negligent he cannot be held liable for the result.

The answer is, that the harm which was foreseeable and the specific harm which actually resulted need not be absolutely identical. Undoubtedly they must both relate to the same persons or class of persons, and to the same subject matter, *i. e.* to an infringement of the same right in the plaintiff; but these requirements are consistent with wide variations as to the mode of bringing about the harm, and the precise nature and extent of the harm. If there is a substantial likelihood that certain conduct, when pursued by the defendant, will result in some appreciable harm to the plaintiff's person, then the defendant, if he so conducts, cannot escape liability on the ground that he could not foresee the precise manner in which the harm would occur, nor the exact nature of the harm, nor the full extent of such harm. What must be foreseen, in order to establish negligence, is "harm in the abstract, not harm in the concrete."[38] The defendant need not foresee "that an injury should occur in the exact way or to the same extent as that which did occur."[39] He need only foresee that some injury of a like general character is not unlikely to result from failure to use care.[40]

---

[38] 1 Street, Foundations of Legal Liability, 104.

[39] See Houston, etc. R. Co. *v.* McHale, 47 Tex. Civ. App. 360, 367, 105 S. W. 1149, 1151–1152 (1907).

[40] Compare quotations from Scofield, J., and Rugg, J., in note 47, *post.*

If I negligently frighten my neighbor's horse and he suddenly whirls around thereby upsetting the carriage and throwing my neighbor out, can I escape liability because the chances were that the horse, instead of whirling about, would have dashed the carriage against a wall? And if my neighbor, having an unusually thin skull, though his appearance does not so indicate, is thrown upon his head and suffers great damage, can I claim to have my liability limited to the damage which would have been suffered by a man with a normal skull?[41] If my negligence inflicts a wound upon another and blood poisoning ensues, can I escape liability for the blood poisoning on the ground that it was not a usual consequence of such a wound?[42]

In Christianson *v.* Chicago, etc. R. Co.[43] the defendants contended that, conceding that the defendant was negligent, yet the plaintiff's injuries were not the proximate result of such negligence. They argued that it is not enough to entitle plaintiff to recover that his injuries were the natural consequence of this negligence, but that it must also appear that, under all the circumstances, it might have been reasonably anticipated that such injury would result. They virtually took the position that, in order to warrant a finding that negligence, not wanton, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, and that it (the injury) was such as might

[41] See Kennedy, J., in Dulieu *v.* White, [1901] 2 K. B. 669, 679; Holmes, J., in Spade *v.* Lynn & Boston R. Co., 172 Mass. 488, 491, 52 N. E. 747, 748 (1899); Louisville & N. R. Co. *v.* Daugherty, 32 Ky. L. Rep. 1392, 1395, 108 S. W. 336, 338 (1908).

[42] Defendant was held liable for the blood poisoning in Armstrong *v.* Montgomery, etc. R. Co., 123 Ala. 233, 26 So. 349 (1899) and in McGarrahan *v.* New York, N. H. & H. R. Co., 171 Mass. 211, 50 N. E. 610 (1898). See also Marsdorf *v.* Accident, etc. Co., [1903] 1 K. B. 584.

". . . the particular consequences of negligence are almost invariably surprises." Watson, Damages for Personal Injuries, § 148, citing Clifford *v.* Denver, S. P. & Pac. R. Co., 9 Colo. 333 (1886).

"It is the unexpected rather than the expected that happens in the great majority of the cases of negligence." Ross, J., in Stevens *v.* Dudley, 56 Vt. 158 (1883).

"The fright of the horse was ordinary, and to be expected. That his conduct when in fright would be unreasoning, insane, and unlooked for was also to be expected. If it were otherwise, it would have been extraordinary, because contrary to common observation."

It is no defense to assert that the township authorities "could not foresee the particular freak of conduct in a terrified horse." Dean, J., in Yoders *v.* Township of Amwell, 172 Pa. St. 447, 455–456, 33 Atl. 1017, 1018 (1896).

[43] 67 Minn. 94, 69 N. W. 640 (1896).

or ought, in the light of attending circumstances, to have been anticipated.

These positions were not sustained by the court. Mitchell, J., said:[44]

"This mode of stating the law is misleading, if not positively inaccurate. It confounds and mixes the definition of 'negligence' with that of 'proximate cause.' What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate, and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow."[45]

So in the often-cited case of Hill *v.* Winsor[46] Colt, J., said:

"It cannot be said, as matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen."[47]

---

[44] At p. 97.

[45] See also the able opinion of Ross, J., in Stevens *v.* Dudley, 56 Vt. 158, 168, 169 (1883); Amidon, J., in Chicago, R. I. & P. Ry. Co. *v.* Stepp, 164 Fed. 785, 794 (1908); Shelby, J., in Texas & P. Ry. Co. *v.* Carlin, 111 Fed. 777, 781 (1901); Goode, J., in Lawrence *v.* Heidbreder Ice Co., 119 Mo. App. 316, 331–332, 93 S. W. 897, 899 (1906). See also full statement in 1 Sedgwick, Damages, 9 ed., §§ 139, 140, 142, 143.

[46] 118 Mass. 251 (1875).

[47] ". . . when the act complained of was such that, in view of all the circumstances, it might not improbably cause damage of some kind, the doer of the act cannot shelter himself under the defense that the actual consequence was one which rarely follows from that particular act." 36 Am. St. Rep. 810.

Compare Marshall, J., in Harrison *v.* Kansas City Electric Light Co., 195 Mo. 606, 629, 93 S. W. 951, 958 (1906).

"In the first place, it is not the law that, to constitute a negligent act, the connec-

If the foregoing views are correct, foreseeability of the specific harm which actually resulted is not an essential legal requisite to the establishment of negligence.

Is such foreseeability of the specific harm an essential legal requisite to making out the existence of causal relation between defendant's negligence and plaintiff's damage? Shall the courts make an arbitrary rule that a defendant's negligence cannot be considered the legal cause of any specific damage, unless the occurrence of such specific damage was probable?

Here we encounter two special sources of difficulty. One consists in confounding two issues which are really distinct. The other arises from using the same word — probability — in two different significations.

In every action for negligence, upon the same state of facts two distinct issues may arise: one, "the preliminary issue of negligence

---

tion must be such that the particular injury could have been foreseen. If injury in some form would be the natural sequence of the negligence, the party guilty of negligence is warned of the danger of his course, and admonished of the necessity of guarding against liability for his negligence, and this is all the warning to which he is entitled under the law." Scofield, J., in Illinois Central R. Co. *v.* Creighton, 63 Ill. App. 165, 169 (1895).

"The test is whether the conditions which led to an extraordinary or even unprecedented accident were such that no reasonably prudent proprietor would have suffered to exist. The particular manifestation of the result of careless conditions is not infrequently quite out of the usual experience, but if the conditions possess elements of negligence, the person responsible for them may also be held responsible for the result." Rugg, J., in Dulligan *v.* Barber Asphalt Paving Co., 201 Mass. 227, 231, 87 N. E. 567, 569 (1909).

See note in 8 Col. L. Rev. 656–658; and Terry, Leading Principles of Anglo-American Law, § 535.

One exception to this general doctrine has been asserted. Conceding that ordinarily a defendant is not exonerated because the particular damage, or the particular manner in which it was brought about (see Terry, Leading Principles of Anglo-American Law, § 535, p. 550) could not have been anticipated, yet it has been said that, where an intelligent responsible human agent intervenes between the doing of defendant's act and the happening of the damage, then the test of "prevision or anticipation enters into the problem." In such a case it is alleged that defendant is never liable unless this intervention of the human agent could have been foreseen. See, for example, Connor, J., in Jennings *v.* Davis, 187 Fed. 703, 711 (1911).

We believe that the above alleged exception cannot be maintained as a legal test. Undoubtedly in many such cases it would be found, as a matter of fact, that the negligent conduct of the earlier tortfeasor had so little continuing potentiality that it could not be regarded as a substantial factor in bringing about the final damage; and the intervening intelligent human agent would be the only party liable. But this finding of fact would not be justified in all cases. See later discussion in Appendix.

vel non"; the other, if negligence is found to exist, the issue as to the causative effect of that negligence.[48]

When it is said that probability or improbability is an element in determining either of these issues, we must carefully ascertain in what sense this language is used. Probability may be a legal test, one of the indispensable requisites, to the finding of an issue; or it may be simply a consideration to which jurors can allow such probative weight as they think proper in coming to a conclusion as to a question of fact.

An action for negligence may give rise to three distinct questions.[49]

Question 1. Has the defendant been guilty of any negligent conduct towards the plaintiff?

Question 2. If (1) is answered in the affirmative, has the defendant's negligence caused, as matter of fact, any damage to the plaintiff? Is there, in fact, a causal relation between defendant's negligent conduct and the damage happening to the plaintiff?

Question 3. If 1 and 2 are both answered in the affirmative, is it expedient for the law to deny plaintiff any recovery for damage which has, as matter of fact, been caused to him by defendant's negligent conduct?

In some reported cases decided in favor of defendant, it is difficult to tell upon which of these three questions the decision really turned. The issues were not kept separate and distinct as they should have been.

It is sometimes contended that the probability that damage will result is an essential legal test to be applied in deciding not only Question 1 but also Question 2. This view is, we think, erroneous.

A probability that some harm may happen, not necessarily the specific harm which did actually result, is legally essential to raise a duty of care and thus establish the existence of negligence.[50] But, if negligence is thus made out, such probability is not a legal requisite to establish the existence of causal relation between defendant's negligent conduct and plaintiff's damage.

It is not generally requisite to show for any purpose the probability of the specific damage which actually resulted. It is not necessary to show a probability of some damage except when the charge

[48] See 2 Labatt, Master and Servant, § 804.

[49] *Cf.* Professor Bohlen, in 41 Am. L. Reg. N. S. 141–142.

[50] See Professor Bohlen in 41 Am. L. Reg. N. S. 147–148.

is one of negligence; and then it is necessary *only for the purpose of establishing negligence.* It is not an essential legal element in the succeeding steps, (1) of establishing the occurrence of damage, and (2) of establishing the existence of causal relation between defendant's negligence and plaintiff's damage. Such probability is no more essential to the existence of causal relation in negligent torts than in intentional torts.[51] As to both intentional torts and negligent torts, in making out the existence of causal relation, probability is a circumstance which may be weighed by the jury, in connection with the testimony, in passing upon the question of fact — whether the causal relation existed. And probability or improbability might sometimes have practically a decisive effect. But it would not be a *legal* test; would not, as matter of law, be decisive.

To illustrate by examples:

Suppose that a plaintiff sues to recover damages for the breaking of his arm, alleged to have been occasioned by defendant's negligently colliding with plaintiff in the street.

Defendant admits the collision, but sets up three distinct defenses:

Defense No. 1. Defendant was not negligent.

Defense No. 2. Plaintiff's arm was not broken; nor did plaintiff sustain any damage whatever. Plaintiff's claim is purely fictitious.

Defense No. 3. If plaintiff's arm was broken, the break was not caused by defendant's negligence; but was wholly attributable to the negligence of a third person who was mixed up in the collision.

When, and how far, is the probability or improbability of an occurrence a *legal* test whereby to decide the issue raised by any of the above defenses?

As to Defense No. 1:

In order to establish the existence of negligence, it must of course appear that there was a duty to use care and an omission to perform that duty. Whether there was a duty upon defendant to use care depends upon the probability that some harm would result to plaintiff in the absence of care. If there was a substantial likelihood that certain conduct on defendant's part would result in harm to plaintiff, then defendant would often be under an obligation to refrain from such conduct, and his failure so to refrain would

[51] See 1 Sedgwick, Damages, 9 ed., § 143, paragraph 2.

constitute negligence. Here, then, the probability or improbability of the occurrence of some harm to the plaintiff is a *legal* test to be applied in determining whether the defendant was negligent. That is: the jury would be instructed, as matter of law, that they could not find that defendant was negligent, unless they found that defendant knew, or ought to have known, that there was a substantial likelihood that some harm would result to plaintiff in case defendant failed to use care in certain respects.

As to Defense No. 2:

Whether the plaintiff's arm was broken is a pure question of fact for the jury. The probability or improbability that such an event would or would not take place does not furnish a *legal* test to be applied by the jury in determining whether it did actually take place. Where there is a conflict of direct testimony, jurors, as sensible men, may allow some weight to probabilities in coming to a conclusion as to whether a certain fact really happened. But there is no rule requiring them, *as matter of law*, to find that the result which was the more probable was the result which actually occurred. They are at liberty to find, and may sometimes be fully justified in finding, that an improbable story is true, or that a probable story is false.

As to Defense No. 3:

Whether the breaking of the plaintiff's arm was caused by the defendant's negligence is a question of fact; the same as the preceding question whether the arm was broken at all. We think that probability or improbability should not furnish a *legal* test for the decision of the question of causation (causative relation) any more than for the decision of the anterior question whether the arm was broken. Here, as there, the jurors may allow some weight to probabilities in coming to a conclusion as to the question of fact. But, as a matter of legal principle, there seems no ground for establishing an absolute rule of law giving artificial weight to the element of probability in passing upon Defense No. 3.[52]

There is no reason why probability should be any more essential to actual existence of causal relation in negligent torts than in intentional torts. Because probability is to a certain extent essential to establishing the existence of negligence, it seems supposed by some persons that it must also of necessity be essential to establishing

[52] This subject will be referred to again later.

the existence of causal relation between defendant's negligence and plaintiff's damage. But the tortious nature of defendant's conduct and the causative effect of that conduct are entirely distinct matters; and what is a requisite element as to the first subject is not necessarily so as to the second.[53]

The alleged rule of non-liability for improbable consequences, even though confined to negligent torts, and even though giving a restricted meaning to the root word "probable," has been vigorously and ably attacked by Mr. Beven in his work on Negligence,[54] and by Professor Bohlen.[55]

The general results reached by these learned writers can be given in very short space.

The questions of (1) the measure of duty and (2) the measure of liability for damage caused by a breach of duty are entirely distinct.[56] In determining whether the defendant was under a duty to take care he is tried by the test of what the average prudent man might have foreseen as the consequence, in a general way, of not taking care; *i. e.* the probability that some harm to plaintiff would result. But if it be once determined that his conduct, tried by that standard, was negligent and that damage has ensued, why should he be entitled to claim that the test of foreseeableness should be applied *a second time* and more minutely to shield him from bearing the full consequence of his proven negligence?

While the fact of negligence is to be determined "by the standard of the reasonable anticipation of the normal man as it appeared to him when he acted," yet the extent of his liability for such negligence, if once found to exist, is to be determined by the test of the actual consequences of his wrong. That is, "once negligence is proven, the anticipation of the wrongdoer cannot limit his liability." [57]

[53] See Judge Mitchell's exposure of the fallacy in the extract already quoted on p. 240. See also 1 Sedgwick, Damages, 9 ed., § 143.

[54] Vol. 1, 3 ed., 88–90.

[55] 40 Am. L. Reg. N. S. 79, 148; and 41 Am. L. Reg. N. S. 141, 147–149.

[56] "The measure of the defendant's duty in determining whether a wrong has been committed is one thing, the measure of liability where a wrong has been committed is another." Holmes, J., in Spade *v.* Lynn & Boston R. Co., 172 Mass. 488, 491, 52 N. E. 747, 749 (1899).

[57] See Professor Bohlen in 40 Am. L. Reg. N. S. 85, 159.

"Foresight of harm furnishes the test of liability while natural consequence measures the extent of liability." [58]

Or, in still more exact language:

"1. The existence of negligence is to be judged by the probable results of the defendant's acts foreseeable by the normal man similarly situated. . . ."

"2. This [negligence] once being admitted or established, the liability for injuries sustained is to be determined by the natural consequences, those resulting from the operation of the ordinary natural laws, animate and inanimate.". . . "the test of liability [is] no longer the foreseeable probability, but an unbroken natural sequence of event." [59]

Two of the strongest judicial utterances in this direction are to be found in the opinions of Channell, B., and Blackburn, J., in Smith *v.* London & S. W. Ry. Co.: [60]

" . . . where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, . . . but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." [61]

". . . what the defendants might reasonably anticipate is. . . only material with reference to the question whether the defendants were negligent or not, and cannot alter [restrict] their liability if they were guilty of negligence." [62]

"This liability is determined by looking *a post* not *ab ante*"; by hindsight rather than foresight; "rather a retrospective than a prospective view of the chain of causation." [63]

---

[58] 1 Street, Foundations of Legal Liability, 451.

[59] Professor Bohlen in 40 Am. L. Reg. N. S. 161.

[60] L. R. 6 C. P. 14 (1870).

"The true matter of doubt here was not whether the defendants were to be held liable for all the consequences of their negligence, but whether as towards the plaintiff they had been negligent at all." Terry, Leading Principles of Anglo-American Law, § 535, p. 553.

[61] Channell, B., *ibid.* 21.

[62] Blackburn, J., *ibid.* 21.

[63] 1 Beven, Negligence, 3 ed., 89, note 2; Professor Bohlen in 40 Am. L. Reg. N. S. 85. See 36 Am. St. Rep., note, p. 808.

The rule laid down in 1 Shearman & Redfield, Negligence, 5 ed., § 28, though not so bluntly stated, would seem to lead to similar results. That rule is: "A person guilty of negligence should be held responsible for all the consequences which a prudent

Mr. Street, if we understand him aright, takes ground substantially in accord with Professor Bohlen. He says:

"The following decisions support the view that when a case of negligence has been made out, liability extends to all consequences which naturally flow from that negligence." It includes "damage that naturally follows and which in reason can be attributed to the negligent act in question." [64]

After giving a summary of various decisions sustaining the above view, the learned author continues:

"There are decisions which are inconsistent with the principle underlying the foregoing cases. These take a narrower view of liability for established negligence, and, if correct, tend to show that liability for negligence extends only to such specific damage as could reasonably be foreseen upon the particular facts confronting the tortfeasor at the time of his negligent act. In this view a negligent act is said to be the proximate cause only of foreseeable damage. Here the foresight test is applied throughout; on the question of recoverable damage as well as on the question of the existence of negligence. We are of the opinion that this view is erroneous. It seems to have resulted from a very natural confusion as regards the application of the test which is applied in determining the primary question of negligence." [65]

If the view criticised by Mr. Street is adopted, the practical result will be, that damages cannot be recovered for negligence, "unless the damage complained of is such as might reasonably be foreseen in the concrete form which it actually takes." [66]

What answers or arguments are urged against the view of Messrs. Bohlen and Beven?

---

and experienced person, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not), would at the time of the negligent act have thought reasonably possible to follow, if they had occurred to his mind."

This rule, even if nominally retaining the test of foreseeability, substitutes for the average man, so far as knowledge of facts is concerned, an omniscient person: and uses the phrase "reasonably possible" instead of "probable."

Cf. Professor Bohlen in 40 Am. L. Reg. N. S. 158.

[64] 1 Street, Foundations of Legal Liability, 111.

[65] 1 Street, Foundations of Legal Liability, 116.

[6] See 1 Street, Foundations of Legal Liability, 451.

First: The law ought to adopt a milder rule of determining the existence of causal relation in cases of negligence than in other torts.

Second: Great hardship, and even ruin, might be occasioned to a negligent tortfeasor, if his liability were extended beyond reasonably foreseeable consequences.

Third: There must be *some* legal test of the existence of causal relation. Probability is the only practicable working test. Hence it must be adhered to, even if it be admitted that it sometimes results in injustice to plaintiffs.

Arguments in favor of the first position:

Negligence is usually less culpable, in a moral point of view, than wilful wrongdoing. The law of negligence is largely a modern conception, and "is in its very nature a compromise."[67] Why not, then, mitigate the liability of a negligent defendant by applying a less drastic rule of legal cause?

Answer:

These considerations are entitled to weight in determining whether negligent conduct shall be punished criminally; or in determining whether to hold a defendant liable for exemplary (punitive, vindictive) damages, in addition to the damage actually suffered by the plaintiff. But they furnish no sufficient ground for excusing a defendant from compensating the plaintiff for the damage actually inflicted upon him by the defendant's tortious conduct. Negligence, followed by damage, is certainly a legal wrong; and is an infinitely more frequent source of harm to innocent plaintiffs than wilful and conscious wrongdoing.

As to the second position:

The argument based on hardship looks only at the interest of one party, the culpable defendant.[68] It entirely ignores the hardship of compelling the innocent plaintiff to go uncompensated for the damage he has sustained in consequence of the defendant's negligence.

If it is said that, when a man commits a tort, he has a right to know what extent of liability he is incurring, the obvious answer is,

[67] See Professor Bohlen in 40 Am. L. Reg. N. S. 83.

[68] See 1 Sutherland, Damages, 3 ed., § 12.

that "no man has ever a *right* to commit on any terms a *wrong*." [69] Where the tortious negligence of one man has caused damage to many persons, it has been urged that the tortfeasor would be ruined if his liability were extended beyond reasonably foreseeable consequences. Such an argument "proceeds upon the assumption that, if a great loss is to be suffered, it had better be distributed among a hundred innocent victims than wholly visited upon the wrongdoer." In truth it is better that the wrongdoer "should be ruined by his negligence, than that he should be allowed to ruin others who are innocent of all negligence or wrong." [70] "Redress to the person injured for whose protection the act was made wrongful is the object, not mercy for the wrongdoer." [71]

Formerly, hardship to an innocent plaintiff was used as an argument for imposing liability upon an innocent defendant. Now, hardship to a guilty defendant is sometimes used as an argument for exonerating a guilty defendant from compensating an innocent plaintiff.

"It may be hard to mulct the wrongdoer in damages for [specific] results which the normal man would not anticipate, but it is more unjust that the person injured by the breach of a duty imposed for his protection should not recover for all the loss which has in ordinary course of nature been caused to him by the wrong because the wrongdoer [while able to foresee that some harm was likely to result] could not foresee the full effect of his act. . . . the loss to the plaintiff is as great, his right to recover should be as certain, if the loss be a natural result of the wrong, whether the defendant intended the whole damage to result, or should have known it would occur, or could not possibly foresee the extent of the consequences of his act." [72]

Upon the question whether the law should recognize a general rule of non-liability for improbable consequences, two compromise views have been suggested. Both involve practically a material modification of the alleged rule.

---

[69] 1 Bishop, New Criminal Law, § 327, note 3.

[70] See Lawrence, J., in Fent *v.* Toledo, etc. Ry. Co., 59 Ill. 349, 361 (1871); Christiancy, J., in Hoyt *v.* Jeffers, 30 Mich. 181, 200 (1874); 36 Am. St. Rep. 823, note; Valentine, J., in Atchison, T. & S. F. R. Co. *v.* Stanford, 12 Kan. 378, 379 (1874).

[71] Professor Bohlen in 41 Am. L. Reg. N. S. 148, note 28.

[72] Professor Bohlen in 40 Am. L. Reg. N. S. 80.

One way is to say, that the law requires a less degree of probability in legal cause than in determining the question of negligence *vel non*.[73] This view, if adopted, will hardly reconcile all the authorities. But why should this distinction be made, and where can the line be drawn as to what lesser degree of probability will suffice? If foreseeableness *is* a requisite to legal cause, why not require as great a degree here as in determining the prior question of the existence of a duty to use care?

Another way is presented in a recent able work, Salmond on Torts. The learned author, as we interpret him, practically asserts that there is no liability in a case where "it is not merely the means but the end itself which is improbable." But he thinks that the rule of non-liability for improbable consequences does not apply to a case (does not prevent recovery in a case) where a foreseeable final result was brought about by unforeseeable means.[74]

The number of actual cases to which this distinction would apply can hardly be large. In most cases where the defendant sets up the defense of improbability, not only the specific method but the specific ultimate result was unforeseeable. Moreover, the distinction seems inconsistent with a general rule of non-liability for improbable specific results. And, even if this difficulty could be got over, the doctrine would not account for or reconcile the cases where the actual damage far exceeded in extent the foreseeable damage, and yet the defendant was held liable for the full amount.

Another view has been advanced, which seems based on a distinction between "direct" and "consequential" damage.

"A plaintiff can recover damages for the direct injury, even though the damages are not such as could have been contemplated." But "where damages are claimed for any other than the direct injury, compensation will not be given unless the injury is a natural consequence of the tort or breach of contract."[75]

---

[73] Suggested, but not finally indorsed, in Terry, Leading Principles of Anglo-American Law, § 551.

[74] "Damage may be natural and probable, although one of the intervening links in the chain of causation may be extremely improbable. For if it is likely that the damage will happen in some way, it makes no difference that the way in which it does actually happen is an unlikely one." Salmond, Torts, 2 ed., 109. *Cf.* Terry, Leading Principles of Anglo-American Law, § 535.

[75] 1 Sedgwick, Damages, 7 ed., 130, 131, notes. But *cf.* 1 Sedgwick, Damages, 9 ed., § 121 *b*.

We can see no sufficient reason for this distinction. If the so-called "consequential damage" is distinctly traceable to the tort as the effective cause, the defendant is none the less liable because of an interval of time or space, or because the effect is produced through the operation of intervening agencies. The cause of a so-called "direct injury" may be more immediately obvious and more easily provable. But the "consequential" damage may equally be the product of the defendant's tort, and that tort may equally be a substantial factor in subjecting the plaintiff to the damage complained of.

Another plea for the nominal retention of the alleged rule is based upon the view that the rule has been so explained, and qualified, and honeycombed with exceptions, that it is now seldom applied in such a way as to bar recovery for damage actually caused by the defendant's tort. Without going through all the possible qualifications or exceptions, attention may be specially directed to the doctrine that the specific consequences, the precise form of damage, need not be foreseeable. Under this doctrine, it is thought that courts can "mitigate" the general rule "whenever its operation seems too harsh." Indeed in many cases, the adoption of this doctrine nullifies the rule. Professor Bohlen goes so far as to say:

"It will be found that even in those jurisdictions where the rule of responsibility is generally broadly stated as for the probable consequences alone, that is in practice modified, wherever the negligence is proved or admitted to exist, into a rule in effect allowing a recovery for all the natural consequences though unforeseeable." [76]

If, then, the operation of the objectionable rule is practically abolished, why spend time in attempting to prove the intrinsic incorrectness of the rule? What matter if the natural interpretation of the rule is evaded by arbitrary qualifications, illogical exceptions, or incongruous subsidiary rules? If these various methods do actually prevent unjust applications of the rule, what harm is done by the nominal retention of the rule?

To these queries there are two answers:

First: We think that the incorrect rule still has more influence

[76] 41 Am. L. Reg. N. S. 148, note 28.

than Professor Bohlen seems disposed to allow. Some erroneous recent decisions seem traceable to it; especially in cases where the facts do not obviously suggest the application of the doctrine of Hill *v.* Winsor.[77]

Second: It is not desirable for the law to use roundabout methods in order to arrive at a right result. Still less is it desirable for the law to affirm inconsistent propositions, which are contradictory to each other. It is better squarely to reject the alleged rule of non-liability for improbable consequences than to affect to maintain the rule, and then practically get rid of it in a large proportion of cases by applying qualifications which are not consistent with the natural interpretation of the rule. It seems absurd to retain it as nominally the general rule, and then explain that, if construed in its natural meaning, it does not apply in the majority of cases. Such a course does not tend to promote legal symmetry or clearness of thought; and it is especially perplexing to beginners in the study of law.

Equally objectionable is the method of evading the operation of the alleged rule by relying on a so-called "conclusive presumption." The law is sometimes said to "conclusively presume" that a defendant foresaw what he did not and could not foresee. What this really means is, that the defendant is held liable for consequences irrespective of their foreseeability.[78]

Jeremiah Smith.

CAMBRIDGE, MASS.

[To be concluded.]

---

[77] 118 Mass. 251, 259 (1875).

[78] For criticism of the term "conclusive presumption," and of its use to enable the court to lay down a rule of substantive law under the guise of a rule of evidence, see 1 Austin, Jurisprudence, 3 ed., 508–509; Gray, Nature and Sources of the Law, § 228; 4 Wigmore, Evidence, § 2492; 2 Chamberlayne, Modern Law of Evidence, §§ 1145, 1146, 1159, 1160.